Supreme Court, U.S.
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No. 99-1038

IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether courts asked to vacate arbitration awards on public policy grounds are limited to determining whether the award itself violates positive law or requires unlawful conduct, or instead may identify "well defined and dominant" public policies and set aside arbitration awards that contravene such policies.

2. Whether there is a well defined and dominant public policy that prohibits enforcement of arbitration awards requiring reinstatement to safety-sensitive positions of employees who test positive for illegal drugs, or whether no such policy exists and courts must therefore uphold such reinstatement.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Eastern Associated Coal Corporation was the plaintiff-appellant below. Respondents the United Mine Workers of America, District 17, and Local 1503 of the United Mine Workers of America, were defendants-appellees below.

Petitioner is wholly owned by Coal Properties Corporation, which is in turn wholly owned by Peabody Holding Company, Inc., which is in turn wholly owned by P&L Coal Holdings Corporation. No publicly held company owns 10 percent or more of petitioner's stock.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported and reproduced in the appendix to the petition for certiorari ("Pet. App.") at 1a. The opinion of the District Court for the Southern District of West Virginia is reported at 66 F. Supp. 2d 796 and reproduced at Pet. App. 5a.

JURISDICTION

The judgment of the Fourth Circuit was entered on August 20, 1999. Pet. App. 1a. The Fourth Circuit denied a timely petition for rehearing and rehearing en banc on September 20, 1999. *Id.* 22a. The petition for certiorari was filed on December 17, 1999, and granted on March 20, 2000. 120 S.

Ct. 1416. The jurisdiction of the Fourth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in an appendix to this brief.

INTRODUCTION

Eastern Associated Coal Corporation ("EACC") employs commercial drivers who drive trucks weighing as much as 55,000 pounds on the public roads and highways of West Virginia. One of EACC's drivers failed a drug test twice within 15 months, and each time EACC tried to fire him. Each time an arbitrator ordered the driver reinstated, although there was no dispute about the accuracy of the test results. After the second reinstatement order EACC went to court, seeking to vacate the order as contrary to public policy. The courts below refused to vacate the award, however, and instead enforced it on the ground that reinstatement of the driver did not violate public policy because it was not illegal.

The judgment below should be reversed. It has long been established that courts will not enforce contracts that are contrary to public policy. That basic principle is not restricted to contracts that violate positive law, but has always extended—almost by definition—to agreements that "violate law *or* public policy." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 42 (1987) (emphasis added).

This rule is fully applicable to arbitration awards entered pursuant to collective bargaining agreements. Despite the traditional deference to such awards, courts will refuse to enforce them if doing so would contravene some "well defined and dominant public policy." *Id.* at 43 (quotation omitted). As federal and state statutes, regulations, and judicial decisions amply confirm, there is such a policy

against both on-the-job impairment and use of illegal drugs at any time by individuals in safety-sensitive positions—particularly in the transportation industry, where an accident caused by drug use could readily endanger innocent lives. Reinstatement of a commercial driver who has twice failed a drug test within 15 months violates that clear public policy. The courts should not lend their aid to such a violation—and become complicit in the threat to public safety it entails—by enforcing the arbitrator's award.

STATEMENT OF THE CASE

Background. In the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, Title V, 105 Stat. 917, 952-965 ("Testing Act"), Congress found that "the use of alcohol and illegal drugs * * * has been proven to have been a critical factor in transportation accidents," that "the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses," and that "the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing." *Id.* §§ 2(4), 2(3), 2(5), 105 Stat. 953. In light of those findings, Congress directed the Secretary of Transportation, "in the interest of commercial motor vehicle safety," to promulgate regulations requiring employers to establish programs for testing their commercial drivers for alcohol and controlled substances. *Id.* § 5(a)(1), 105 Stat. 959.[1]

The Secretary issued such regulations in 1994, "to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial vehicles." 49 C.F.R.

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[1] The legislation also covered pilots and other aviation employees, railroad workers, and mass transit employees. *See* Testing Act §§ 3-4, 6, 105 Stat. 953-959, 962-963.

§ 382.101. The DOT regulations specify minimum requirements for such programs, but do not otherwise affect the authority of employers with respect to alcohol or drugs, or restrict "additional employer policies with respect to the use of alcohol or controlled substances, including any consequences for a driver found to have a specified alcohol or controlled substances level * * *." *Id.* § 382.601(c); *see id.* § 382.111. In issuing the testing rules, the Secretary noted that the "primary objective" was "deterrence rather than detection," and stressed that it was therefore important that "employers make their drivers fully aware of * * * the potential consequences for people who violate this rule." 59 Fed. Reg. 7484, 7502 (Feb. 15, 1994).

EACC is a coal mining company. Its business requires the operation of heavy equipment—including mammoth trucks having gross vehicle weights of as much as 55,000 pounds—on public roads and highways. Pet. App. 6a. Operators of such equipment hold a position within EACC known as a Mobile Equipment Operator ("MEO"), and are required to have a commercial driver's license ("CDL"). That requirement triggered coverage under the DOT regulations, *see* 49 C.F.R. § 382.103(a), and EACC accordingly established an alcohol and drug testing program for its drivers. Pet. App. 6a-7a. Under EACC's Drug and Alcohol Policy, "[i]f a driver submits a urine specimen for the purpose of a drug test, and the test shows positive levels * * * the driver will be removed from any safety sensitive position and subject to disciplinary action *up to and including termination*." *Id.* 9a n.4 (emphasis added).

EACC and the union representing its employees—respondents United Mine Workers of America, District 17, and Local 1503 of the United Mine Workers (collectively, "the Union")—are bound by the National Bituminous Coal Wage Agreement ("Agreement"). *Id.* 5a. Under the Agreement, "[t]he management of the mine, the direction of the working force and the right to hire and discharge are

vested in" EACC. J.A. 24. EACC may discharge an employee for "just cause." *Id.* 30. An employee who believes just cause does not exist for his discharge may initiate a grievance procedure culminating in arbitration. *Id.* 31.

James Smith's Positive Drug Tests. In early 1996, EACC drilling operator James Smith bid on and was selected to fill a vacant MEO position. Under the DOT regulations, employees filling such a position must be tested "[p]rior to the first time [they] perform[] safety-sensitive functions for an employer," 49 C.F.R. § 382.301(a), and randomly thereafter. *Id.* § 382.305(a). In a test conducted in March 1996, Smith tested positive for the presence of cannabinoids—the chemical constituents of marijuana. Pursuant to the procedure outlined in the Agreement, EACC suspended Smith with the intent to discharge him, and then discharged him.

Neither Smith nor the Union ever challenged the accuracy of the 1996 drug test. Pet. App. 7a n.2. Nevertheless, Smith filed a grievance challenging his discharge, and an arbitrator entered an award in his favor. Under the award, Smith returned to work after a 30-day suspension without back pay and was required to participate in a substance abuse program. The arbitrator also required Smith to submit to random drug testing for five years. *Id.* 7a.

In June 1997, while Smith was working as an MEO, his fourth random drug test yielded another positive result for cannabinoids, and EACC again suspended and then discharged him. *Id.* 3a, 7a-8a. Smith again sought arbitration without challenging the accuracy of the test results, *id.* 8a n.3, and an arbitrator again ordered Smith reinstated. It is this second arbitration award, described more fully below, that is directly at issue in this case.

The Arbitration Award. The arbitrator found that "[t]he record is clear that the company has made a good faith effort through it's [sic] employee assistance program to rehabilitate the grievant," and that while Smith "appeared to be making a

good faith effort to be rehabilitated," his "failure to stay drug free is disappointing." *Id.* 27a. The arbitrator further recognized that "[i]t is understandable why the company wants to put an end to the matter by discharging grievant. The liability the company faces when an employee assigned to operate company equipment on public roads is found with drugs in his urine is very real." *Id.* The arbitrator found that Smith had received "full credit for his good record in the earlier arbitration" and for the fact that he was a "recreational user of illegal drugs and not an addicted user." *Id.*[2] Criticizing Smith's argument that he might have avoided a first positive test had he been aware that he was going to be tested upon moving to an MEO position, the arbitrator noted that "[o]ne does not avoid illegal drugs because one might be tested," but rather because "drugs have a negative impact on job performance, safety and company liability." *Id.* 28a.

Despite all this, the arbitrator once again "rescued" Smith from the "understandable" consequences of his actions. *Id.* 27a. He found "creditable" Smith's testimony that a "personal/family problem * * * caused this one time lapse in drug usage." *Id.* 28a. The arbitrator nevertheless recognized the possibility that he may have been "misled by the grievant," and apparently found comfort in the fact that he was "confident," if that were the case, "that the grievant will make another misstep with drug use and be caught." *Id.* Giving Smith the chance to make such a "misstep" while operating heavy equipment on the public highways, the arbitrator ordered Smith reinstated. The arbitrator urged Smith "to handle both the personal/family problems along with the

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[2] The reference to Smith's "good record" referred to his prior employment record with the company, not to any previous experience under the drug testing program. Testing was instituted at EACC in January 1996, when the DOT regulations took effect, and Smith's first failure occurred in March 1996. His second failure came only 14 months after he was reinstated following the first failure. Pet. App. 25a-26a.

drug use problem" in future counseling, and required him to provide EACC with a resignation letter which the company could accept if Smith tested positive for drugs a *third* time. *Id.* 29a.

Decisions Below. Seeking to overturn the arbitration award, EACC filed a complaint in federal district court which alleged, among other things, that the reinstatement award clearly violated public policy and therefore must be vacated. J.A. 11-12. The Union filed an answer and counterclaim seeking enforcement of the award. *Id.* 14-20. Both parties moved for summary judgment.

The District Court upheld the arbitrator's decision and granted the Union's motion to enforce the award. The court recognized that the question whether the award should be set aside on public policy grounds is "one for resolution by the courts." Pet. App. 17a (quoting *Misco*, 484 U.S. at 43 (citations and internal quotation marks omitted)). The court reviewed a variety of sources—including the DOT regulations and decisions from the First, Fifth, Eighth, and Eleventh Circuits—and determined that "a well defined and dominant public policy exists against the use of controlled substances by those who perform safety sensitive jobs." *Id.* 20a. The court then turned to the question whether the arbitration award requiring reinstatement to a safety-sensitive position of a driver who has twice failed a drug test within 15 months was contrary to that policy.

The court determined that public policy did not warrant vacating the arbitrator's reinstatement award because "the DOT Regulations do not *require* that employees who test positive for drug use be automatically discharged." *Id.* 20a-21a (emphasis added). The District Court held that the public policy exception to enforcement of arbitration awards could not be invoked "[b]ecause the DOT Regulations do not make it *illegal* to reinstate employees who test positive for drug use." *Id.* 21a (emphasis added). As the court con-

cluded: "Consequently, the public policy exception does not apply inasmuch as the arbitrator's award is consistent with the DOT Regulations." *Id.*

On appeal, EACC reiterated its position that the arbitrator's award should be vacated because it contravenes the well defined and dominant public policy that justifies the establishment of alcohol and drug testing programs for commercial drivers in the first place. *See* EACC Ct. App. Br. 18-23; Reply Br. 11-14. The Union agreed with the District Court that public policy could not be invoked to overturn the order reinstating Smith because the DOT regulations do not themselves require his discharge or bar his reinstatement. *See* Union Ct. App. Br. 9, 26. The Fourth Circuit found that "the district court correctly decided the issues before it," and affirmed "on the reasoning of the district court." Pet. App. 4a. EACC's timely petition for rehearing and rehearing en banc was denied, *id.* 22a, and EACC petitioned for certiorari. That petition was granted on March 20, 2000. 120 S. Ct. 1416.

SUMMARY OF ARGUMENT

I. This Court has long recognized that it retains the authority, indeed the obligation, to decline to enforce a private agreement that is contrary to public policy. This fundamental principle—deeply rooted in the common law—has never been limited to contracts that are illegal or require unlawful conduct, but has always extended to agreements that "violate law *or* public policy." *Misco*, 484 U.S. at 42 (emphasis added). To be sure, this Court has carefully confined the public policy doctrine by insisting that the public policy invoked be "well defined and dominant" and "be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* at 43 (quotations omitted). That safeguard, however, has never been understood to limit courts to those violations of public policy that have been anticipated by

legislatures or regulatory authorities and prohibited by positive law. *See* Restatement (Second) of Contracts § 178(1) (1981).

These principles are fully applicable to arbitration awards entered pursuant to collective bargaining agreements. As this Court has explained, a court may refuse "to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy;" this is but "a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *Misco*, 484 U.S. at 42. Courts typically defer to labor arbitration awards, but the grounds for such deference—the agreement of the parties to be bound by the arbitrator's decision, and the arbitrator's presumed expertise in the law of the shop and the construction of the agreement—are wholly inapplicable when it comes to assessing the impact of an award on third parties and the public interest. As this Court has made clear, "the question of public policy is ultimately one for resolution by the courts." *Id.* at 43 (quotation omitted).

The courts below, however, concluded that the public policy exception "does not apply" because the arbitrator's award was not illegal. Pet. App. 20a-21a. This Court's cases make clear that such a view of the exception is unduly narrow. The judgment below may be vacated on that ground alone, and the case remanded for the courts below to consider whether the award contravenes well defined and dominant public policy, even though it is not illegal and does not require unlawful conduct.

II. The result of a proper consideration of the public policy doctrine—whether undertaken in the first instance by this Court or the courts below—should be clear. It was undisputed below that there is a well defined and dominant public policy against the performance of safety-sensitive jobs by those under the influence of illegal drugs. The Union argued

that this policy was not implicated in this case, however, because the driver "simply test[ed] positive for drugs." But Congress and the Executive have made clear that the distinction the Union would draw cannot stand. In the Testing Act and the regulations issued pursuant to it, the political branches have specified that, with respect to certain positions directly affecting the safety of the traveling public, the policy against performing safety-sensitive jobs while impaired must be expanded to a policy against the holding of those positions by individuals who use drugs—"whether on duty or off duty." Testing Act, § 2(3), 105 Stat. 953. That policy is directly implicated by a driver who "simply tests positive for drugs."

That does not necessarily mean that every reinstatement award violates public policy. Whether a particular award does so depends upon an assessment of the extent of the threatened harm, the probability that the reinstated employee will engage in the dangerous conduct, and the broader impact reinstatement will have on the deterrent effect of the testing regime mandated by Congress. Here the threat to public safety is clear: Smith operates heavy equipment on the public highways. The prospect that he will use drugs again is also high: Smith is a repeat offender, and neither a prior brush with termination, nor participation in a rehabilitation program, nor the clear knowledge that he was subject to testing sufficed to deter further drug use. What is more, in ordering reinstatement the arbitrator never found that Smith was unlikely to use drugs again, simply that he had an explanation for his relapse. Finally, the deleterious impact on the testing program mandated by Congress is clear: Smith's reinstatement undermines the key deterrent force of that program, and will inevitably lead other employees to believe that they, too, are entitled to not only a second but a *third* chance before they need take the prohibition on drug use seriously.

The arbitrator's award returning Smith to his safety-sensitive position therefore violates public policy and should not be enforced. The fact that the arbitrator has interpreted the collective bargaining agreement to allow reinstatement is not dispositive; that simply poses the question to be answered by application of the public policy doctrine. Nor is it determinative that the testing regulations allow reinstatement. Those regulations do not expressly address the case of a repeat offender, and specifically provide that drivers who fail drug tests—even first-time offenders—may be subject to consequences in addition to those specified in the regulations. Those consequences include application of the public policy doctrine to any arbitral award ordering reinstatement.

ARGUMENT

I. AN ARBITRATOR'S AWARD NEED NOT VIOLATE POSITIVE LAW BEFORE IT MAY BE SET ASIDE AS VIOLATING WELL DEFINED AND DOMINANT PUBLIC POLICY.

In *Misco*, this Court granted certiorari to decide, but did not reach, the question whether a court may refuse to enforce an arbitration award on the ground that it violates public policy only when the award itself violates a statute, regulation, or some other manifestation of positive law. *See* 484 U.S. at 45 n.12; *id.* at 46 (Blackmun, J., concurring). The question left open in *Misco* is the first question presented here.

The courts below erred in answering that question. The District Court concluded that "the public policy exception does not apply inasmuch as the arbitrator's award is consistent with the DOT Regulations." Pet. App. 21a. In the court's view, Smith's reinstatement by the arbitrator did not violate public policy "[b]ecause the DOT Regulations *do not make it illegal* to reinstate employees who test positive for drug use." *Id.* (emphasis added). In other words, in the language of the question presented in *Misco*, the District Court held that since the arbitration award was not contrary

to positive law, there was no affront to public policy. The Court of Appeals adopted that reasoning as its own. *Id.* 4a. That view, as shown below, is quite wrong.

A. It Is Well Established That A Court Will Not Enforce A Contract Contrary To Public Policy.

As well settled as any proposition in the law of contracts is the rule that courts will not enforce otherwise valid agreements if doing so would be contrary to public policy. *See* Restatement (Second) of Contracts (hereinafter, "Restatement"), Chapter 8 (1981) ("Unenforceability on Grounds of Public Policy"). The public policy doctrine has been recognized and applied in this Court's cases for well over a century. *See, e.g., Sprott* v. *United States*, 87 U.S. 459, 463 (1874) ("The proposition that there is in many cases a public policy which forbids courts of justice to allow any validity to contracts because of their tendency to affect injuriously the highest public interests, * * * is too well settled to admit of dispute."); *Trist* v. *Child*, 88 U.S. 441, 448 (1874) (the doctrine "is a rule of the common law of universal application"); *Meguire* v. *Corwine*, 101 U.S. 108, 111 (1879) (doctrine is so well settled that "to go over the same ground again * * * would be a waste of time"); *President of the Bank of the United States* v. *Owens*, 27 U.S. 527, 539 (1829) ("To enumerate here all the instances and cases in which this reasoning has been practically applied, would be to incur the imputation of vain parade.").[3] Although this Court now

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[3] The doctrine is an ancient one, the roots of which can be traced to the early common law—and beyond. *See* Percy H. Winfield, *Public Policy in the English Common Law*, 42 Harv. L. Rev. 76 (1928) (examining the doctrine from the Fourteenth Century); *Trist* v. *Child*, 88 U.S. at 448 ("In the Roman law it was declared that 'a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding.'") (quoting Institutes of Justinian, lib. 3., tit. 19, par. 24). The Court in *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899), noted that "[a]bout the earliest illustration of this doctrine is * * * the famous case of *The Highwayman*. It is stated

decides fewer contract cases than it once did, its modern cases leave no doubt that the doctrine is alive and well. *See, e.g.*, *Misco*, 484 U.S. at 42-43; *Town of Newton* v. *Rumery*, 480 U.S. 386, 392 (1987); *Hurd* v. *Hodge*, 334 U.S. 24, 34-36 (1948).[4]

The public policy doctrine is based in part on "the basic notion that no court will lend its aid to one who founds a cause of action on an immoral or illegal act." *Misco*, 484 U.S. at 42. *See Hurd* v. *Hodge*, 334 U.S. at 35 (where enforcement of contract would violate public policy, "it is the obligation of courts to refrain from such exertions of judicial power"); *Ritter* v. *Mutual Life Ins. Co.*, 169 U.S. 139, 154 (1898) ("A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment."); *Owens*, 27 U.S. at 538 ("no court of justice can in its nature be made the handmaid of iniquity"); Restatement, Introductory Note to Chapter 8 ("enforcement of the promise may be an inappropriate use of the judicial process in carrying out an unsavory transaction").

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that Lord Kenyon once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was questioned whether the legend in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one."

[4] Even in the era of *Lochner* v. *New York*, 198 U.S. 45 (1905), the high watermark of contractual liberty in this country, the Court did not waver from the rule that a contract contrary to public policy is invalid, even as it declared numerous statutes to be unconstitutional for impinging upon the freedom of private individuals to contract as they please. *See, e.g.*, *Hazelton* v. *Scheckells*, 202 U.S. 71 (1906) (Holmes, J.) (applying the public policy doctrine).

The doctrine is also premised on the fact that, when a court is asked to enforce a private agreement, it has a duty to protect those who are affected by, but not parties to, the contract. As this Court said in *Misco*, "the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." 484 U.S. at 42. *See also Seymour* v. *Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993) (doctrine derives "from the public's interest in having its views represented in matters to which it is not a party but which could harm the public interest"). *Cf. Martin* v. *Wilks*, 490 U.S. 755, 761 (1989) (referring to " 'the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed' ") (quoting the Court of Appeals).

B. The Public Policy Exception To Enforcement Of Contracts Is Not Limited To Contracts That Violate Positive Law.

This Court has *never* held, or even said, that a contract must actually contravene the terms of a statute or other positive law before it may be said to violate public policy. On the contrary, the Court has indicated time and again that the public policy doctrine is not so confined. In the leading case of *Marshall* v. *Baltimore & Ohio Railroad*, 57 U.S. 314 (1853), the Court said:

> It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; *or* which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. [*Id.* at 334 (emphasis added).]

See also Walworth v. *Kneeland*, 56 U.S. 348, 353 (1853) ("a contract, forbidden by an act of Congress, *or against its policy*," is void) (emphasis added); *Trist* v. *Child*, 88 U.S. at

448 ("In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, *or* inconsistent with sound policy and good morals.") (emphasis added); *Meguire* v. *Corwine*, 101 U.S. at 111 ("Whether forbidden by a statute *or condemned by public policy*, the result is the same.") (emphasis added).

In *The Kensington*, 183 U.S. 263 (1902), Mrs. Bleeker and her daughter booked passage on a steamer bound for New York from Antwerp. The voyage was rough, and on arrival in America the Bleekers' luggage, which had been stowed in upper steerage, "was found to be totally destroyed." *Id.* at 264. "By constant shifting, it had been reduced to an almost unrecognizable mass, was commingled with debris of broken china and straw, and covered with water." *Id.* The Bleekers' ticket limited the ship's liability to 250 francs pursuant to Belgian law, but this Court held the limitation on liability void as against public policy. The holding is noteworthy, for the Court specifically rejected "the suggestion that, because there is no statute expressly prohibiting such contracts * * * therefore they should be enforced." *Id.* at 270.[5]

More recently, in *Hurd* v. *Hodge*, 334 U.S. 24 (1948), a companion case to *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), the Court held that judicial enforcement of a racially discriminatory restrictive covenant in the District of Columbia would contravene public policy. The Court based its decision on the fact that, were a state court to enforce such a covenant, its action would violate the Equal Protection Clause of the Fourteenth Amendment. *See Hurd*, 334 U.S. at 35-36 (citing *Shelley*). *Hurd* is highly instructive because the Fourteenth Amendment did not apply in that case—it of course applies only to the States—and the Fifth Amend-

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[5] *See also Owens*, 27 U.S. at 540 ("Nor is the rule applicable only to contracts expressly forbidden; for it is extended to such as are calculated to affect the general interest and policy of the country.").

ment—which does apply to the District of Columbia—had not yet been construed to contain an equal protection component. *See Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Thus, this Court in *Hurd* concluded that enforcement of the covenant would contradict public policy even though it would violate no applicable constitutional provision.

In *Town of Newton* v. *Rumery*, 480 U.S. 386 (1987), the First Circuit had adopted a *per se* rule that so-called release-dismissal agreements—wherein a criminal defendant contracts away the right to sue under 42 U.S.C. § 1983 for constitutional violations in exchange for the prosecutor's dropping of charges—violated public policy and were unenforceable. Although this Court disagreed, its approach to the issue is important. Nothing in Section 1983 prohibits release-dismissal agreements, but the Court did not reverse on that basis or even mention that fact. Instead, the Court explained that "[t]he relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." 480 U.S. at 392 (citing Restatement § 178(1)). The Court then went on to balance the competing policy considerations implicated by release-dismissal agreements. Central to the Court's holding that such agreements are not unlawful *per se* was the fact that the right to file a Section 1983 suit is a private right, the waiver of which does not substantially impair any interests of the public at large. *See id.* at 394-396.

The provision of the Restatement favorably cited in *Town of Newton* states in full: "A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable *or* the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement § 178(1) (emphasis added). *See also id.* § 179 ("A public policy against the enforcement of promises or other terms may be derived by the court from (a) legislation

relevant to such a policy, or (b) the need to protect some aspect of the public welfare * * *."). And the Restatement's official commentary specifically observes that

> even though a field is the subject of legislation, a court may decide that the legislature has not entirely occupied the field and may refuse to enforce a term on grounds of a judicially developed public policy *even though there is no contravention of the legislation.* [*Id.* § 179, comment b (emphasis added).]

See also id. (in many public policy cases "legislation is significant, not as controlling the disposition of the case, but as enlightening the court concerning some specific policy to which it is relevant").

The leading treatises are in accord with the Restatement. According to Professor Williston, "bargains are illegal if they violate an express provision of positive law *or* the purpose of positive law, though not expressly prohibited, *or* if they are otherwise inimical to public policy." 5 *Williston on Contracts* § 12:1, at 559 (4th ed. 1993) (emphasis added); *see also id.* at 546 ("Illegal bargains" include "those opposed to positive law, those which are contrary to morality, *and* those which offend public policy") (emphasis added). Similarly, Professor Corbin writes that "[s]ome judges have thought that they must look solely to constitutions and statutes and to earlier decisions interpreting and applying them as the sources from which they may determine what public policy requires. This is far from true, even though they are the sources that are first to be considered and that often may be conclusive." 6A *Corbin on Contracts* § 1375, at 15 (1962). *See also id.* § 1374, at 6 ("Public Policy" is "another source of 'illegality,' besides statute and judicial decision").[6]

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[6] One scholar has noted that the public policy doctrine applies, not only to illegal contracts, but also to contracts that "(1) offend constitutional and statutory policies; (2) harm marriage or domestic relations; (3) injure the rights of third parties; (4) exculpate,

For their part, lower courts have often refused to enforce contracts deemed to violate public policy, but not positive law.[7] In *Shadis* v. *Beal*, for example, the Third Circuit specifically rejected the argument that a contract must "be 'illegal' in a literal sense before it could be invalid," noting that "the scope of the public policy doctrine is broader and more encompassing than the concept of illegality." 685 F.2d at 833. The court also observed that, under the Restatement, "it is sufficient if the legislature makes an adequate declaration of public policy which is inconsistent with the contract's terms." *Id.* at 833-834.

Finally, it must be recognized that adopting a rule that a contract must violate positive law to trigger the public policy doctrine would have the effect of nullifying the doctrine. The role of courts under such a rule would be limited to determining whether a contract called for illegal action; there

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indemnify, or otherwise restrict recovery of damages for negligence; (5) abridge a fiduciary duty; (6) restrict access to the courts or obstruct the administration of justice; or (7) restrain trade." G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 Cal. L. Rev. 431, 441 (1993).

[7] *See, e.g.*, *Davies* v. *Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396-1400 (9th Cir.) (settlement agreement restricting right to run for elective office), *cert. denied*, 501 U.S. 1252 (1991); *Shadis* v. *Beal*, 685 F.2d 824, 833-834 (3d Cir.) (contract prohibiting state-funded legal services provider from seeking or receiving attorney's fees in suits against the state), *cert. denied*, 459 U.S. 970 (1982); *McBrearty* v. *United States Taxpayers Union*, 668 F.2d 450, 451 (8th Cir. 1982) (contract to pay certain expenses incurred by member of tax protest organization should he be incarcerated); *Walters* v. *Fullwood*, 675 F. Supp. 155, 160 (S.D.N.Y. 1987) (contract between college athlete and professional sports agents in violation of NCAA rules); *Capazzoli* v. *Holzwasser*, 490 N.E.2d 420, 422 (Mass. 1986) (promise by man to support woman in exchange for her promise to abandon her marriage to another man).

would be no "public policy" left for courts to apply. *See, e.g.*, Bret F. Randall, Comment, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. Rev. 759, 782 (positive law rule "robs the public policy exception of all its substance"). As shown above, the adoption of such a rule would fly in the face of centuries of contract law, the Restatement, and the view of scholars. And what is perhaps most troubling, that rule would compel federal courts to give their imprimatur to *any* private agreement, no matter how odious or injurious to the public, so long as it did not run afoul of a specific statutory provision. That has never been, and should not be, the law.

There is no question that the public policy doctrine is strong medicine, and should be carefully and sparingly invoked. This Court long ago circumscribed the doctrine with appropriately rigorous standards, explaining that "[p]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. * * * [T]here must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to public policy." *Muschany* v. *United States*, 324 U.S. 49, 66 (1945). Within these limits, however, courts retain the authority to decline to enforce contracts that are contrary to public policy, whether or not those contracts are themselves illegal or require unlawful conduct.[8]

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[8] An English jurist famously remarked nearly two centuries ago that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you." *Richardson* v. *Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824) (Burrough, J.). But Professor Corbin has aptly rejoined that "however unruly the horse may be, it is not possible for the courts to refuse to ride." 6A *Corbin on Contracts* § 1375, at 11-12 n.9.

C. The Public Policy Doctrine Applies To Labor Arbitration Awards.

1. This Court has made clear that the public policy doctrine is fully applicable in the labor relations context. *See W.R. Grace & Co.* v. *Local Union 759, Int'l Union of Rubberworkers*,. 461 U.S. 757, 766 (1983) ("As with any contract, * * * a court may not enforce a collective bargaining agreement that is contrary to public policy."); *Misco*, 484 U.S. at 43 (same). Thus, it is settled that a court may refuse "to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy"; this is but "a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *Id.* at 42. *See also W.R. Grace*, 461 U.S. at 766 ("If the contract as interpreted by [arbitrator] Barrett violates some explicit public policy, we are obliged to refrain from enforcing it.").[9] And whether or not an arbitrator purports to take the public interest into consideration, "the question of public policy is ultimately one for resolution by the courts." *Id.*

In *W.R. Grace*, this Court confirmed that any public policy sufficient to override an arbitral award "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Id.* (quoting *Muschany*, 324 U.S. at 66). Thus, in considering the company's claim

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[9] The public policy doctrine does not favor one side or the other in labor disputes; it can be invoked to aid employees as well as employers. *See, e.g., Local No. P-1236* v. *Jones Dairy Farm*, 680 F.2d 1142, 1144-45 (7th Cir. 1982) (company work rule held to be against public policy). *See also National Licorice Co.* v. *NLRB*, 309 U.S. 350, 360 (1940) (employer could not enforce contractual provision executed with individual employees; provision was "in plain conflict with the public policy of the [National Labor Relations] Act to encourage the procedure of collective bargaining").

that enforcement of such an award would violate public policy, the Court proceeded to examine two "important" public policies (461 U.S. at 766, 770)—obedience to court orders and voluntary compliance with Title VII—concluding ultimately that these policies would not be violated by enforcement of the award.

In *Misco*, this Court reaffirmed what it had said in *W.R. Grace*—"that 'a court may not enforce a collective-bargaining agreement that is contrary to public policy,' and * * * that 'the question of public policy is ultimately one for resolution by the courts.'" 484 U.S. at 43 (quoting *W.R. Grace*, 461 U.S. at 766). In *Misco*, the Fifth Circuit had refused to enforce an arbitration award based on what it described as the public policy "against the operation of dangerous machinery while under the influence of drugs." *Id.* at 44. This Court—without agreeing or disagreeing that such a public policy exists—held that the Fifth Circuit had not complied with the command of *W.R. Grace* because the court "made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a 'well-defined and dominant' public policy." *Id.* *Misco* and *W.R. Grace* thus leave no doubt that it is the proper role and duty of courts to consider the public policy ramifications of labor arbitration awards before lending their authority to enforce them.[10]

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[10] This Court has also recognized the applicability in the labor relations context of the related doctrine that courts will not enforce illegal contracts. In *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), the Court held that a coal producer was entitled to have a court adjudicate its claim that part of its collective bargaining agreement with the UMWA was in violation of, *inter alia*, the Sherman Act and hence unenforceable. The Court noted that "[t]here is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law," and also added that it is "well established" that "a federal court has a duty to determine whether a

2. Although public policy must be determined *by reference* to laws and legal precedents, that does not mean that an arbitrator's award must actually contravene the terms of a statute or other positive law before it may be said to violate public policy. Indeed, the majority of federal circuit courts that have considered the question have rejected the positive law requirement in applying the public policy doctrine to arbitration awards under collective bargaining agreements—just as such a requirement has been rejected as a general matter in applying the doctrine.[11]

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contract violates federal law before enforcing it." *Id.* at 77, 83. The Court even drew upon the public policy doctrine in support of this holding. *See id.* at 77-78 & n.4.

[11] *See Exxon Shipping Co.* v. *Exxon Seamen's Union*, 73 F.3d 1287, 1293-95 (3d Cir.) ("*Exxon III*"), *cert. denied*, 517 U.S. 1251 (1996); *Exxon Shipping Co.* v. *Exxon Seamen's Union*, 11 F.3d 1189, 1192 (3d Cir. 1993) ("*Exxon II*"); *Exxon Shipping Co.* v. *Exxon Seamen's Union*, 993 F.2d 357, 363 (3d Cir. 1993) ("*Exxon I*"); *Gulf Coast Indus. Workers Union* v. *Exxon Co., U.S.A.*, 991 F.2d 244, 250 n.7 (5th Cir.) ("*Gulf Coast*"), *cert. denied*, 510 U.S. 965 (1993); *Iowa Elec. Light & Power Co.* v. *Local Union 204, IBEW*, 834 F.2d 1424, 1427-28 n.3 (8th Cir. 1987) ("*Iowa Electric*"); *E.I. DuPont de Nemours & Co.* v. *Grasselli Employees Indep. Ass'n*, 790 F.2d 611, 616 (7th Cir.) ("*DuPont*"), *cert. denied*, 479 U.S. 853 (1986); *United States Postal Serv.* v. *American Postal Workers Union*, 736 F.2d 822, 824 (1st Cir. 1984) ("*Postal Service*"). *But see Westvaco Corp.* v. *United Paperworkers Int'l Union*, 171 F.3d 971, 977 (4th Cir. 1999); *United Food & Commercial Workers Int'l Union, Local 588* v. *Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir. 1996); *United States Postal Serv.* v. *National Ass'n of Letter Carriers*, 810 F.2d 1239, 1241 (D.C. Cir. 1987), *cert. dismissed*, 485 U.S. 680 (1988); *Northwest Airlines, Inc.* v. *Air Line Pilots Ass'n, Int'l*, 808 F.2d 76, 83 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *American Postal Workers Union* v. *United States Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986).

In the First Circuit's *Postal Service* case, "[t]he heart of the Union's argument [was] that although there may be a public policy against embezzling Postal Service funds, there is no public policy against the Postal Service employing convicted embezzlers." 736 F.2d at 824. Rejecting that argument, the First Circuit held that there need not be a "direct legal prohibition" against reinstatement before a court may apply the public policy doctrine. *Id.* Nine years later, the Third Circuit also rejected the rule that an arbitrator's award "only violates public policy where it contravenes a rule of positive law which forbids reinstatement of the employee" and held instead that "[t]he broader test adopted by the First, Sixth, Seventh, and Eighth Circuits appears to be the sounder approach to the question whether an arbitration award violates public policy." *Exxon I*, 993 F.2d at 363. That same week, the Fifth Circuit joined the list. *See Gulf Coast*, 991 F.2d at 250 n.7.

The courts that have rejected the positive law rule have emphasized four reasons. First, they have noted the lack of precedent for such a rule. *See DuPont*, 790 F.2d at 616 ("the courts have never construed the public policy exception so narrowly"). Second, they have recognized that even when the reinstatement of a discharged worker does not violate any specific law or regulation, it can nevertheless undermine the purpose and impair the effectiveness of a regulatory scheme aimed at public safety. *See, e.g., Exxon I*, 993 F.2d at 364 (reinstatement of oil tanker helmsman who failed drug test after his ship ran aground would violate no positive law but "would thwart achievement of the overriding interest in public safety furthered by the regulations"); *Exxon III*, 73 F.3d at 1295 (reinstatement of seaman who refused for-cause drug test would be legally permissible but "would violate public policy because it would undercut enforcement of Coast Guard regulations and environmental statutes"). Third, courts have recognized that, with the positive law rule, there would no longer be a public policy doctrine. *See AFSCME* v.

Department of Cent. Management Servs., 671 N.E.2d 668, 679 (Ill. 1996) ("We believe that a bright-line test requiring that the award itself violate an *explicit* law has the potential to swallow the public policy exception.") (emphasis in original); *see also Stead Motors of Walnut Creek* v. *Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1222 (9th Cir. 1989) (en banc) (Trott, J., dissenting) (broader approach "gives life to the public policy exception rather than suffocating it beyond resuscitation"), *cert. denied*, 495 U.S. 946 (1990). Finally, courts have noted the unacceptable consequences of the positive law rule: the judiciary would be "powerless" (*Gulf Coast*, 991 F.2d at 253) to set aside and must instead enforce an arbitrator's decision to reinstate, for example, employees who piloted an airline or drove a truck while drug-impaired or intoxicated—even in the most egregious case. *See, e.g., Exxon II*, 11 F.3d at 1193-94; *DuPont*, 790 F.2d at 616; *Postal Service*, 736 F.2d at 824-825.

3. It will surely be argued here that using the public policy doctrine to nullify a labor arbitration award that violates no positive law is itself inconsistent with another national policy—*i.e.*, the policy of the labor laws favoring collective bargaining, arbitration of labor disputes, and limited judicial review of arbitral decisions. That objection is misguided, for several reasons.

To begin with, in most cases a court does not, and should not, second-guess the decision of an arbitrator because that decision, however questionable it may be, is what the parties bargained for. But such an abdication of the traditional judicial role has no place when an arbitrator's decision adversely affects a third party who has not consented to the collective bargaining agreement. When an arbitration award threatens public safety or some other well defined public policy, respect for private contractual arrangements supplies no basis for courts to withhold close scrutiny of such awards. *See Misco*, 484 U.S. at 42 ("the public's interests in confin-

ing the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements"); *Jones Dairy Farm*, 680 F.2d at 1144 (arbitration award "affects not only the Company and its employees but also the consuming public which does not participate in the arbitration but which nonetheless has a very real interest in insuring that meat and meat products are processed under sanitary conditions"); Carie Fox & Brian Gruhn, *Toward a Principled Public Policy Standard: Judicial Review of Arbitrators' Decisions*, 1989 Det. C.L. Rev. 863, 872, 895.

Furthermore, it is ordinarily proper for a court to defer when an arbitrator's decision concerns construction of a collective bargaining agreement, due to the arbitrator's presumed expertise in such matters. But deference is not warranted when public policy is at issue because "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). *Accord McDonald* v. *City of West Branch*, 466 U.S. 284, 290 (1984). Interpreting labor agreements may be the bailiwick of arbitrators, but "the question of public policy is ultimately one for resolution by the courts." *W.R. Grace*, 461 U.S. at 766.

Finally, because an arbitrator derives authority from the agreement between the parties, an arbitrator usually is not authorized to consider factors external to the agreement itself. *See McDonald*, 466 U.S. at 290-291; *Alexander*, 415 U.S. at 52-54. As this Court explained in *Alexander*, an arbitrator " 'has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties.' " 415 U.S. at 52 n.16 (quoting Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016 (1955)). The Labor Management Relations Act endorses agreement between the parties on a method for

settling disputes "over the application or interpretation of *an existing collective-bargaining agreement*," 29 U.S.C. § 173(d) (emphasis added)—not over issues of public policy—and the deference due that method is correspondingly limited.

Accordingly, an arbitrator is restricted in taking notions of public policy into account when rendering a decision. *See W.R. Grace*, 461 U.S. at 766 (arbitrator's "view of his own jurisdiction precluded his consideration of this [public policy] question"); *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981) ("Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the [Fair Labor Standards Act], he may issue a ruling that is inimical to the public policies underlying the FLSA * * *."); *Iowa Electric*, 834 F.2d at 1427 ("collective bargaining agreements do not formulate public policy, and arbitrators cannot consider matters not encompassed by the governing agreements"); *Jones Dairy Farm*, 680 F.2d at 1144 ("Public policy considerations are wholly independent of the collective bargaining agreement."). Since arbitrators do not consider public policy, courts must.

The foregoing is fully consistent with this Court's seminal *Steelworkers* trilogy.[12] In those cases, in which the Court held that it is proper for courts to refuse to review the merits of an arbitration award under a collective bargaining agreement, the Court stressed that the expertise of labor arbitrators resides "at the plant level." *Enterprise Wheel*, 363 U.S. at 596. "They sit to settle disputes * * * that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry * * *." *Id.* The Court also relied on the fact that the power of a labor arbitrator "is

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[12] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960).

confined to interpretation and application of the collective bargaining agreement"; "his award is legitimate only so long as it draws its essence" from that agreement. *Id.* at 597. Nothing about the application of the public policy doctrine at issue here undermines these settled authorities; the doctrine in fact picks up where the strong policy favoring arbitration leaves off—when the effects of the pro-arbitration policy are visited on those who are not a part of the process.[13]

In sum, it does not undermine the collective bargaining and arbitration processes to have courts review arbitration awards—just as they have always reviewed other contracts—for violation of public policy.

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[13] *Wright* v. *Universal Maritime Service Corp.*, 525 U.S. 70 (1998), noted that, after *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), it is an open question whether a union may waive an employee's right to a judicial forum for federal statutory claims through a collective bargaining agreement ("CBA") that requires arbitration of such claims. The *Wright* Court did not resolve that question, 525 U.S. at 77, but even if the answer were yes, it could hardly be contended that a union has the authority to waive the rights of *non*-workers or otherwise contract against the public interest. *See Gilmer*, 500 U.S. at 34 ("a labor arbitrator has authority only to resolve questions of contract rights").

Additionally, *Wright* explained that the presumption in labor law that claims are arbitrable "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA*. * * * The dispute in the present case, however, ultimately concerns not the application or interpretation of any CBA, but the meaning of a federal statute." 525 U.S. at 78-79 (emphasis in original). Likewise, the public policy doctrine does not involve CBA interpretation but rather requires courts to make judgments with reference to relevant statutes, regulations, and precedents.

D. The Decision Of The Court of Appeals Cannot Stand.

In this case, the courts below upheld Smith's reinstatement over public policy objections on the ground that the DOT regulations "do not require" that he be discharged and "do not make it illegal" for him to get his job back. Pet. App. 20a-21a. If this Court agrees with petitioner on the first question presented and rules that courts asked to vacate arbitration awards on public policy grounds are *not* limited to asking whether the award violates positive law or requires unlawful conduct, then the courts below considered this case under an erroneous view of the law. In this circumstance, the Court could remand the case for consideration of the public policy issue by the District Court and the Court of Appeals under the correct view of the law. *See Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237 (1995) (concluding, after determining applicable legal test, that it would be "best to remand the case to the lower courts for further consideration in light of the principles we have announced"). *See also NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below"); *United States* v. *Bestfoods*, 524 U.S. 51, 72-73 (1998) (declining to "decid[e] in the first instance an issue on which the trial and appellate courts did not focus").

The Court could also conclude, however, that the issue is ripe for resolution now. Numerous courts not hobbled by an erroneous view on the positive law question have examined the public policy against drug use by those in safety-sensitive positions and have concluded that the policy would be violated by the arbitral reinstatement orders at issue in those cases. *See supra* note 11. As detailed below, moreover, the sources for this policy are readily available laws and regulations, and the reinstatement order at issue here plainly contravenes that policy. Thus, there is no need to remand for consideration of the public policy question in the first instance by the courts below under a proper understanding of

the scope of the public policy doctrine. We therefore proceed to address the question whether it violates well defined and dominant public policy to put Smith—who failed two drug tests in 15 months—back behind the wheel of a 55,000 pound truck traveling the West Virginia roads.

II. ENFORCEMENT OF THE REINSTATEMENT AWARD IS CONTRARY TO WELL DEFINED AND DOMINANT PUBLIC POLICY.

In *Misco*, this Court criticized the Fifth Circuit because it had "made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a 'well-defined and dominant' policy against the operation of dangerous machinery while under the influence of drugs." 484 U.S. at 44.[14] This was not to say that no such policy could have been identified had the court undertaken the appropriate inquiry. The Court acknowledged that "certainly" such a policy "is firmly rooted in common sense"; the failure of the lower court was in not grounding its formulation of that common-sense policy " 'by reference to the laws and legal precedents.' " *Id.* (quoting *W.R. Grace*, 461 U.S. at 766 (quoting *Muschany*, 324 U.S. at 66)).

As we explain below, the public policy implicated in this case is readily grounded in such authorities, and is plainly violated by enforcement of the award reinstating Smith to his safety-sensitive position.

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[14] The *Misco* Court was also concerned about the circuit court's refusal to accept the arbitrator's determination that the evidence was insufficient to show the employee's drug use. *See* 484 U.S. at 39-42. Here, by contrast, the Union has never disputed the accuracy of the two drug tests Smith failed, and the arbitrator accepted the Union's position that "the grievant is guilty as charged." Pet. App. 27a.

A. There Is An Undisputed Well Defined and Dominant Public Policy—Derived From Legislation, Regulation, And Precedent—Against Employees Performing Safety-Sensitive Jobs While Under The Influence Of Illegal Drugs.

At the most general level, it is clear that there is today a well defined and dominant public policy, "ascertained by reference to the laws and legal precedents," *Misco*, 484 U.S. at 44 (quotations omitted), against drug use in the workplace. *See, e.g.*, Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 (imposing drug-free workplace requirements on federal contractors); Drug-Free Workplace Act of 1998, 15 U.S.C. § 654 (providing assistance for small businesses to establish drug-free workplace programs); Executive Order No. 12564, 5 U.S.C. § 7301 note (1986) (prohibiting drug use by federal employees and mandating testing program for certain positions). *See also Gulf Coast*, 991 F.2d at 250 ("There are countless statutes, regulations, company guidelines, and judicial decisions that pronounce the emphatic national desire to eradicate illicit drugs from the workplace.").

Both the strength of that policy and its grounding in laws and legal precedents are intensified and focused with respect to those in safety-sensitive positions, particularly in the transportation industry—where employees under the influence of drugs endanger both co-workers and large numbers of innocent third parties.[15] Indeed, only two years after

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[15] Protecting the safety of the traveling public has long been a recognized basis for invocation of the public policy exception. *See, e.g., Baltimore & Ohio S.W. Ry.* v. *Voigt*, 176 U.S. 498, 506 (1900) (doctrine gives effect to "the importance which the law justly attaches to human life and personal safety"); *Chicago, St. Louis & New Orleans R.R.* v. *Pullman Southern Car Co.*, 139 U.S. 79, 90 (1891) ("It is * * * a fundamental condition in all such [common carrier] contracts that their provisions must not be injurious to the public."); *NLRB* v. *Dixie Motor Coach Corp.*, 128 F.2d 201, 203 (5th Cir. 1942) ("The public interest * * * requires of any one entrusted with the lives and safety of the travelling

Misco was decided, this Court recognized that the "governmental interest in ensuring the safety of the travelling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 (1989).[16] And a decade after *Misco*, the First Circuit was able to state—in a case involving drug use by a truck driver responsible for "a five-axle tractor-trailer combination which, when fully loaded, carries 12,000 gallons of highly flammable motor fuel" through densely populated areas—that "society has achieved a broad national consensus that persons should not be allowed to endanger others while laboring under the influence of drugs," and that "[t]here is a plenitude of positive law to support the existence of a well defined and dominant public policy against the performance of safety-sensitive jobs while under the influence of drugs * * *." *Exxon Corp.* v. *Esso Workers' Union, Inc.*, 118 F.3d 841, 843, 848, 846-847 (1st Cir. 1997). The First Circuit found that "[j]udicial decisions, agency regulations, and legislative enactments combine to form a solid phalanx of positive law evidencing" such a public policy. *Id.* at 849.

Reflecting the strength of this consensus, there was no dispute in the courts below that there is a well defined and dominant public policy against the performance of safety-sensitive jobs by employees who are actually under the

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public that he conduct himself in a manner in keeping with his responsibilities. * * * The undisputed facts show that this employee's drinking habits * * * place[d] upon his employer the duty to discharge him."). This is an area in which the impact on innocent third parties is particularly direct and tangible, justifying public policy scrutiny of private agreements. *See Misco*, 484 U.S. at 42.

[16] The covered employees required to take drug tests under the program at issue in *Skinner* were railroad workers.

influence of drugs. Pet. App. 18a. In endorsing this conclusion, the District Court (whose opinion was adopted by the Fourth Circuit, *see id.* 4a) cited decisions of the Fifth, Eighth, and Eleventh Circuits.[17] The District Court could also have cited a variety of authorities expressly forbidding on-the-job drug use in industries where public safety is a particular concern. Regulations of the Federal Highway Administration, for example, provide that no driver of a commercial vehicle "shall be on duty and possess, be under the influence of, or use" specified controlled substances. 49 C.F.R. § 392.4(a).[18]

For its part, the Union assumed in the courts below that there exists a "well defined and dominant public policy against employees operating machinery while under the influence of drugs," and therefore never challenged the existence of such a public policy.[19] *See also* Opp. Cert. 4 ("the courts have consistently recognized the public policy against the performance of safety-sensitive jobs by those impaired by drugs"); *id.* at 15-16 (citing cases).

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[17] *See* Pet. App. 18a-19a (citing *Gulf Coast*, *supra* (worker at petrochemical refinery); *Exxon Corp.* v. *Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996) (chemical plant employee); *Union Pac. R.R.* v. *United Transp. Union*, 3 F.3d 255 (8th Cir. 1993) ("*Union Pacific*") (railroad brakeman), *cert. denied*, 510 U.S. 1072 (1994); *Delta Air Lines, Inc.* v. *Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988) (commercial airline pilot), *cert. denied*, 493 U.S. 871 (1989)).

[18] *See also, e.g.*, W. Va. Code § 17C-5-2 (West Virginia criminal statute prohibiting the operation of motor vehicles by those under the influence of controlled substances); W. Va. Code § 17E-1-13(a) (one year disqualification from driving commercial motor vehicle after conviction for driving under the influence of controlled substance).

[19] Reply Brief of District 17 and Local Union 1503 United Mine Workers of America (Dkt. 18) at 3-4.

B. There Is Also A Well Defined And Dominant Public Policy—Derived From Legislation, Regulation, And Precedent—Against Employees In Safety-Sensitive Positions Using Illegal Drugs Whether On Or Off The Job.

The Union did contend that there is no well defined and dominant public policy against performance of a safety-sensitive job by an employee who "simply tests positive for drugs," without evidence of on-the-job impairment.[20] The District Court recognized, however, that some decisions "expand[] th[e] public policy from situations where the employee is shown to be under the influence of drugs to situations where the employee merely tests positive for drugs although there is no evidence that he was under the influence while on the job." Pet. App. 19a (citing *Esso Workers' Union*, *supra*; *Exxon Corp.* v. *Baton Rouge*, *supra*). The District Court endorsed that expanded public policy when it found, based upon its examination of the authorities, "that a well defined and dominant public policy exists against the use of controlled substances by those who perform safety sensitive jobs," *id.* 20a—regardless of whether that use occurs on or off the job.

The public policy against such illegal drug use by those entrusted with safety-sensitive jobs in the transportation industry is not only "firmly rooted in common sense," *Misco*, 484 U.S. at 44; it has also been confirmed by Congress and the Executive. Those branches have made clear that the general policy against illegal drug use, and the particular concern about drug use in the workplace, are heightened when drug use by those in safety-sensitive transportation

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[20] Memorandum in Support of Defendants' and Counterclaimants' Motion for Summary Judgment (Dkt. 11) at 9; Union Ct. App. Br. 25 (same). *See also United Transp. Union* v. *Union Pac. R.R.*, 116 F.3d 430, 434 (9th Cir. 1997) (concluding that public policy not violated by reinstatement of employee who "merely tested positive for drugs").

positions is at issue, to the extent that special legislation and special programs designed to eradicate such use have been enacted.

In particular, Congress has identified those safety-sensitive jobs where the public policy against drug use is at its zenith by requiring that certain transportation workers be subjected to pre-employment, random, reasonable suspicion, and post-accident drug testing. In adopting the Testing Act, Congress made findings that "the use of alcohol and illegal drugs has been * * * proven to have been a critical factor in transportation accidents," and that "the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, *whether on duty or off duty*, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses." §§ 2(4), 2(3), 105 Stat. 953 (emphasis added). Finding that "the most effective deterrent to abuse of alcohol and use of illegal drugs is testing, including random testing," Congress mandated a regime of testing for employees in the aviation, railroad, motor carrier, and mass transportation industries. §§ 2(5), 3-6, 105 Stat. 953-965. *See also* 46 U.S.C. § 7702(c)(2) (testing for merchant seamen); 42 U.S.C. § 2473c (testing for safety and security positions in space program).

As it applies in the context of this case, the Testing Act amended the Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. § 31301, *et seq.*, to require the Secretary of Transportation to establish a program requiring motor carriers to conduct "preemployment, reasonable suspicion, random, and post-accident testing of operators of commercial vehicles for the use of a controlled substance in violation of law or a United States government regulation." *Id.* § 31306(b)(1)(A). The Secretary issued detailed regulations in response to this requirement in 1994. *See* 59 Fed. Reg. 7484 (Feb. 15, 1994).

In issuing the regulations, the Secretary made clear that public policy prohibits not just the performance of safety-

sensitive functions while actually under the influence of illegal drugs, but also performance of those functions by individuals who use drugs. Thus, for example, 49 C.F.R. § 382.213(b) provides that "[n]o employer having actual knowledge that a driver *has used* a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function," (emphasis added), and 49 C.F.R. § 382.215 imposes the same prohibition where an employer knows that a driver has tested positive (or, as the Union put it below, "simply" tested positive) for drugs. *See also id.* at § 382.501(b). Under these sections, "[a] driver is prohibited from performing, and an employer is prohibited from using a driver to perform, safety-sensitive functions after a positive drug test result * * * *regardless of when the drug * * * was ingested and regardless of whether or not the driver is under the influence of * * * drugs * * *.*" 59 Fed. Reg. at 7495 (emphasis added).

The boundaries of the policy against drug use can also be discerned by comparison with the regulations' treatment of alcohol use. When it comes to alcohol, the regulations take pains to specify that drivers "shall only be tested * * * while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions." 49 C.F.R. § 382.305(m). *See also id.* § 382.311(b). There is no such restriction with respect to controlled substances testing. While there is no policy against employing in the covered positions individuals who use alcohol—so long as they do not do so while on the job or in a way that impairs their performance—there *is* a policy against employing those who use illegal drugs, regardless of the time of use or evidence of impact on performance.[21] The Union, in acknowledging the

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[21] This distinction is further reflected in the references to prevention of the "misuse" of alcohol and the "use" of illegal drugs. *See, e.g.*, 49 C.F.R. § 382.101. *See also* Testing Act § 2(3), 105

public policy against performance of safety-sensitive jobs by those under the influence of illegal drugs, but insisting that public policy is not implicated by use of illegal drugs by those entrusted with such jobs, draws a line expressly rejected in the DOT regulations and the Testing Act itself.

This statutory and regulatory regime is duplicated in the other transportation contexts addressed in the Testing Act,[22] and clearly establishes the existence of a well defined and dominant public policy that—as the Federal Motor Carrier Safety Administration has phrased it—"[i]llicit use of drugs by safety-sensitive drivers is prohibited *on or off duty*."[23] *See also* Testing Act, § 2(3), 105 Stat. 953 (finding of need to eliminate drug use by truck drivers "whether on duty or off duty"). As the *Esso Workers' Union* court observed, "few elements of public policy command the consensus that attaches to the policy against the use of controlled substances by those whose work potentially imperils others." 118 F.3d at 849.

The District Court's rejection of the Union's view that public policy was not implicated when an employee in a safety-sensitive position "merely" tests positive for illegal drugs was well founded. Drug testing is required for those in such positions not for its own sake, but rather to promote the underlying policy against drug use by those in safety-sensitive positions. As the Third Circuit observed in *Exxon III*, "[t]he federal government has manifested its strong

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Stat. 953 (referring to the need to eliminate "abuse of alcohol" and "use of illegal drugs, whether on duty or off duty").

[22] *See* 14 C.F.R. Part 121, Appendix I (airline workers); 49 C.F.R. Part 219 (railroad workers); *id.* Part 653 (mass transportation workers).

[23] FMCSA, Overview of Drug & Alcohol Testing Rules (June 1996) (emphasis added) (visited May 31, 2000) <http://www.fmcsa.dot.gov/safetyprogs/drugs/engtesting.htm>.

support for drug testing of employees involved in mass transportation through the promulgation by all federal agencies governing mass transportation of regulations *designed to prevent drug use by employees in safety-sensitive positions*." 73 F.3d at 1294 (emphasis added). Testing directly serves that policy both by identifying those who use illegal drugs and by acting as a deterrent to drug use by employees in the covered positions. *See* 59 Fed. Reg. at 7494 ("The primary purpose of the testing provisions is to deter misuse of alcohol and controlled substances.").

The Testing Act and the regulations issued pursuant to it thus confirm the pertinent public policy not merely against performance of safety-sensitive jobs by those actually under the influence of drugs, but against the holding of such jobs by those who use drugs. The substantial extent to which the political branches have spelled out the boundaries of this policy demonstrates that it meets the requirements of *Misco* and *W.R. Grace*. Congress and the Executive—not the courts—have already identified the particular safety-sensitive positions to which the policy applies.[24] Congress and the Executive—not the courts—have already determined what substances are covered by the policy. *See* 49 C.F.R. §§ 40.21(a), 382.107. Congress and the Executive—not the courts—have already determined to promote the policy through a mandatory testing regime, and have established testing procedures and identified the detection levels necessary to establish a violation. *See* 49 C.F.R. Part 40; 49 C.F.R. § 382.105. And many other details pertinent to the policy at issue have already been firmly established by the political branches.

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[24] *See* 49 U.S.C. § 45102(a), (b) & 14 C.F.R. Part 121, App. I, Part III (air); 49 U.S.C. § 20140 & 49 C.F.R. § 219.3 (rail); 49 U.S.C. § 31306(b)(1)(A) & 49 C.F.R. § 382.103 (commercial motor vehicle); Testing Act, § 5(b)(7), 105 Stat. 962 & 49 C.F.R. § 653.7 (mass transit).

Thus, petitioner is not asking that the courts be empowered to engage in a wide-ranging examination of what is good public policy, unguided by the judgments of the political branches, and to establish detailed boundaries for that policy. Rather, it is asking that the courts be permitted to acknowledge the substantial policy development already undertaken by those branches and not lend their aid to the enforcement of contracts that undermine those policies. As we explain next, enforcement of the award reinstating Smith would do just that.

C. Enforcement Of The Arbitrator's Award Reinstating Smith Would Violate Public Policy.

1. There is no doubt that well defined and dominant public policies prohibit a person, such as Smith, from engaging in illegal drug use—whether on or off the job—while employed in a position that Congress has determined to be safety-sensitive and subject to random drug testing. The overarching goal of these policies, of course, is to ensure public safety. The question presented by this case, therefore, is whether the enforcement of the arbitrator's award reinstating Smith is contrary to the well-defined and dominant public policies designed to ensure the safety of the public.

When a contract is objected to on the ground that its enforcement would violate public policies which protect public health or safety, the relevant question for the court is whether enforcement would pose an unreasonable risk that the harm the policies seek to avoid will be realized, thereby making such enforcement contrary to the policies at issue. *See* 14 *Williston on Contracts* § 1644B, at 180 (3d ed. 1972) (public policy forbids "[b]argains which require a performance likely to jeopardize unreasonably the life or health of either or both parties, or of a third person"); *Hanford* v. *Connecticut Fair Ass'n*, 103 A. 838, 839 (Conn. 1918) (contract to hold a baby show void on public policy grounds if, due to an epidemic, holding the show "would be highly dangerous to the health of the community"). In this particular context, therefore, the

issue is whether an arbitration award reinstating a drug user to a safety-sensitive transportation position would pose an unreasonable risk to public safety contrary to the well defined and dominant policies identified by the political branches. *See Union Pacific*, 3 F.3d at 262 ("What violates public policy in this case is the Board's decision to reinstate to his former position a railroad employee who poses a significant risk to the public because of his potential for future use on the job."); *Amalgamated Meat Cutters* v. *Great Western Food Co.*, 712 F.2d 122, 125 n.1 (5th Cir. 1983) ("enforcement of the arbitral award would have created a serious potential danger to the health or lives of third persons—* * * in this case, other highway travellers"). Where the risk is too great that the employee's reinstatement would inflict significant injury on the traveling public contrary to well defined and dominant policies, the reinstatement violates those policies.[25]

In determining whether reinstatement would constitute an unreasonable risk of harm, courts have considered several factors. The first is the magnitude of the potential harm to life, health, and property that could result if the employee were to engage in the dangerous conduct prohibited by public policy (here, driving massive trucks under the influence of drugs). *See Exxon I*, 993 F.2d at 367 ("In concluding the award violated public policy, we emphasize * * * the poten-

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[25] This determination can only be made based on the particular facts and circumstances of the case at hand. *See Town of Newton*, 480 U.S. at 392, 397 (considering enforceability "in the circumstances" and with respect to the particular release-dismissal "agreement presented by this case"); *id.* at 399, 402 (O'Connor, J., concurring) (agreeing with the Court's "case-by-case approach" and its decision "on the facts of this particular case" and engaging in a "[c]lose examination of all the factors in this case"); *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411, 421 (1959); Restatement § 178(1) (applicability of public policy doctrine determined "in the circumstances").

tially disastrous effects of a major oil spill on the environment.").

The second factor is the probability that the employee would, in fact, engage in the dangerous conduct if reinstated. *See DuPont*, 790 F.2d at 615 (reinstatement of employee who went on destructive rampage not against public policy since "the likelihood of a future mental breakdown * * * is remote"). *See also W.R. Grace*, 461 U.S. at 769 (analyzing whether enforcement of arbitration award would create "intolerable incentives" to violate public policy against disobeying court orders).[26] In this regard, the presence or absence of findings by the arbitrator on whether the employee has been (or could be) successfully rehabilitated is relevant; courts are free to conclude from the absence of suitable findings giving assurance that the employee will not be dangerous in the future that the arbitration award does not adequately protect public safety. *See Union Pacific*, 3 F.3d at 262 ("the Board's reinstatement of Madison without determining the likelihood of his working on the railroad in the future under the influence of alcohol or drugs violates the public policy"); *Exxon I*, 993 F.2d at 364 n.7 (public policy violated "[w]here, as here, the arbitration panel found that Foster had used marijuana, but required Exxon to reinstate [him] * * * without also finding that he had been 'cured' or rehabilitated"). Even more probative than such predictive

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[26] Thus, the analysis is not confined to whether it is certain that an injury-causing accident would occur. This Court has made clear that a contract is void when it has a "baneful tendency" to violate public policy. *Crocker* v. *United States*, 240 U.S. 74, 79 (1916) (contingent fee agreements for securing government contracts invalid because of risk of corruption). *Accord Ritter*, 169 U.S. at 154; *Tool Co.* v. *Norris*, 69 U.S. 45, 55 (1864). *See also Burt* v. *Union Cent. Life Ins. Co.*, 187 U.S. 362, 369 (1902) (refusing to enforce life insurance policy on person executed for capital murder to avoid giving beneficiaries "an inducement" to withhold exculpatory evidence at insured's trial).

judgments, of course, is concrete evidence of the success or failure of past rehabilitation efforts involving the individual at issue. *See Gulf Coast*, 991 F.2d at 255 (public policy violated by arbitral reinstatement of employee "who had already taken advantage of his company's rehabilitation-focused treatment program" before failing drug test).

The third factor to be considered is the extent, if any, to which reinstatement would encourage other workers to engage in the prohibited conduct or undermine employer efforts to deter such conduct. *See United States Postal Serv.* v. *National Ass'n of Letter Carriers*, 481 U.S. 1301, 1303 (1987) (Rehnquist, C.J., in chambers) (reinstatement of letter carrier found with 3,500 pieces of undelivered mail in his car "will seriously impair the [Postal Service's] ability to impress the seriousness of the Postal Service's mission upon its workers"); *Exxon II*, 11 F.3d at 1193 n.7 (examining "condonation" effect; "the arbitration award requiring Fris's reinstatement sent an undesirable signal to other employees that alcohol abuse in a safety-sensitive job and industry would not be severely punished") (quotation marks and brackets omitted); *Postal Service*, 736 F.2d at 825 (considering effect "rehiring of Cote would have on other postal employees * * * [who] may feel there is less reason for them to be honest than they believed—the Union could always fix it if they were caught"). *See also Weil* v. *Neary*, 278 U.S. 160, 173 (1929) ("What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases.").

2. In this case, there is no question that returning Smith to his job would pose an unreasonable risk of harm to the public. As to the first factor described above—the magnitude of potential harm—it requires no great exercise of imagination to foresee the tragedy that could occur were Smith to

navigate his mammoth truck on the roads of West Virginia under the influence of marijuana.[27]

As to the second factor—the probability of harm—the facts as found by the arbitrator suggest that Smith is likely to use drugs again. Smith did not "merely" fail a drug test; he is a repeat offender. His latest dismissal occurred after he failed a drug test, was terminated and then "rescued" by an arbitrator's reinstatement award, Pet. App. 27a, went through the company's rehabilitation program, was put on notice that he would face random drug tests in the future, and then failed a subsequent drug test—within 14 months of his reinstatement after his first failure. In short, Smith—perhaps encouraged not to take the drug policy seriously by his first reinstatement—was neither rehabilitated nor deterred by his first positive drug test, termination, and substance abuse treatment. There is no reason to be confident the process will succeed after his second reinstatement. *See Gulf Coast*, 991 F.2d at 255; Brief Amicus Curiae of the Institute for a Drug-Free Workplace 16-18.

It is important to note that the arbitrator made no finding that Smith was unlikely to use drugs in the future. While the arbitrator did find "creditable" Smith's explanation—that a "personal/family problem" caused him to resort to marijuana use, Pet. App. 28a—that conclusion says nothing about whether Smith was likely to use drugs in the future—whether for a "good" reason or for no reason at all. Indeed, in urging that Smith "handle both the personal/family problems along with the drug use problem" in future counseling, the arbitrator indicated that the asserted cause of the drug use was

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[27] Large trucks—defined as those weighing more than 10,000 pounds—accounted for only 3 percent of registered vehicles but 13 percent of all traffic fatalities in 1998. Of those fatalities, 86 percent were occupants of another vehicle or nonoccupants. National Highway Traffic Safety Administration, *Traffic Safety Facts 1998—Large Trucks* 1-2 (DOT HS 808 952).

ongoing. *Id.* 29a. The arbitrator also did not rule out the possibility that Smith could be pulling the wool over his eyes. *Id.* 28a.[28]

The third factor—the effect of reinstatement on others—also cuts strongly against enforcing the award. EACC has numerous workers in safety-sensitive positions. If other EACC employees see Smith hold on to his job after failing not one, but two drug tests, the deterrent force of the testing program will be dissipated. And in a future arbitration it will be difficult for EACC to argue—and unlikely that an arbitrator would accept—that another similarly situated employee who has failed one, or even two, drug tests should be discharged when Smith was given a *third* chance.

In these circumstances, reinstating Smith would make a mockery of the drug testing regime mandated by Congress and the DOT regulations and implemented by EACC. As the First Circuit has observed, "[i]t makes no sense to construe public policy as encouraging—and in some cases mandating—employers to establish and enforce drug-testing programs, yet to preclude them from taking decisive action against those employees who test positive." *Esso Workers' Union*, 118 F.3d at 850. On the contrary, "it would insult public policy for a court to enforce a contract that requires the ongoing employment in a safety-sensitive capacity of a worker who has scorned the employer's drug-free workplace program." *Id.* at 851.

In sum, Smith's reinstatement to a highly dangerous occupation—on a record that gives no assurance that he will not

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[28] While the arbitrator somehow took comfort in his supposition that Smith would be caught if he once again engaged in illegal drug use, Pet. App. 28a, it is plainly unreasonable to require the public to shoulder the risk that Smith's third strike might be discovered by sifting through the rubble of an accident involving his 55,000 pound truck.

use drugs in the future—poses an unreasonable risk of harm to the traveling public and, accordingly, violates well defined and dominant public policy. A contract with a tendency "to endanger the public interests or injuriously affect the public good, * * * ought never to receive the sanction of a court of justice." *Ritter*, 169 U.S. at 154.

D. The Contrary Arguments Are Unavailing.

Arguments that similar reinstatement awards should not be enforced have generally been met with two responses by those lower courts that have refused to upset orders returning drug users to safety-sensitive positions. First, some courts have suggested that the employer is bound by the fact that the contract leaves open the possibility of reinstatement rather than establishing a *per se* termination rule for employees who use controlled substances. Second, courts have declined to upset reinstatement on the theory that the pertinent regulations permit some lesser sanction and do not require termination but in fact contemplate reinstatement. *See, e.g., IBEW, Local 97* v. *Niagara Mohawk Power Corp.*, 143 F.3d 704, 727 (2d Cir. 1998) (declining to upset reinstatement because company "acquiesced" in an agreement "that did not provide it with sufficient authority" and because regulator "has chosen not to confront this issue directly"). Neither objection is well taken.

As for the former, contract-based objection, it is entirely non-responsive to the very doctrine being considered. In *every* case where a contract is not enforced because it is contrary to public policy, the parties have necessarily agreed to a result different from the one mandated by public policy.[29] For the reasons explained at 12-14, *supra*, courts

[29] Here, of course, EACC expressly provided through its Drug and Alcohol Policy that a driver testing positive for drugs "will be removed from any safety sensitive position and subject to disciplinary action *up to and including termination*." Pet. App. 9a n.4 (emphasis added).

nevertheless retain the authority—indeed, the obligation—not to enforce contracts that would violate public policy. *See W.R. Grace*, 461 U.S. at 766 ("As with any contract * * * a court may not enforce a collective bargaining agreement that is contrary to public policy."); *Pullman Southern*, 139 U.S. at 89 ("the law will not permit individuals to oblige themselves by contract, when the thing to be done or omitted is injurious to the public"). It is no answer to say that the parties could have avoided the conflict with well defined and dominant policy by entering into a different contractual arrangement; the question is whether a court —cognizant of the interests of the public, who are not parties to the contract—will enforce a private arrangement that is contrary to public policy.

The second objection—limiting the court's discretion to what the regulations require—is simply a reprise of the "positive law" issue left unresolved in *Misco*, as the District Court's opinion below demonstrates. If, as the discussion in Part I makes clear, there is a longstanding and necessary role for the courts to discern and protect public policy without being limited to those offenses against public policy specifically anticipated in legislation and regulation, then it would make no sense to reject a public policy argument on the ground that legislation or regulations do not dictate the result compelled by public policy.[30]

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[30] In the past, arbitrators have entered awards reinstating (1) a drunk airline pilot who flew a Boeing 727 filled with passengers while having a blood alcohol level of .13, *see Delta Air Lines*, *supra*; (2) the helmsman of an 635-foot oil tanker who tested positive for marijuana after his ship ran aground, *see Exxon I*, *supra*; (3) an intoxicated truck driver who overturned an eighteen-wheel tractor-trailer rig, *see Amalgamated Meat Cutters*, *supra*; and (4) a nuclear power plant employee who deliberately violated federal safety regulations to leave early for lunch, *see Iowa Electric*, *supra*. The adoption of respondents' position would

This is especially true here. In the first place, the regulations the courts below found dispositive do not expressly address the issue of a repeat offender such as Smith. It is far from clear that in allowing reinstatement of a driver who completes a program of referral, evaluation, and treatment, and passes a return-to-duty test, 49 C.F.R. §§ 382.309, 382.503, 382.605, the regulations were also intended to allow a *second* reinstatement of drivers who have been through that drill before and nevertheless test positive again. That question is simply not addressed by the regulations.

Second, in issuing the regulations, the Secretary made clear that—even with respect to first-time offenders—the regulations do not exhaust the possible consequences for an employee who tests positive for illegal drugs. The regulatory regime expressly contemplates the prospect of additional consequences imposed pursuant to authority beyond the regulations. *See id.* §§ 382.111, 382.601(c) (permitting "additional employer policies with respect to the use of alcohol or controlled substances, including any consequences for a driver found to have a specified alcohol or controlled substances level"). Indeed, in issuing the regulations, the Secretary stated that "[c]ompliance with the prescribed treatment and passing the [follow up drug] test(s) will not guarantee a right of reemployment." 59 Fed. Reg. at 7503. And regulatory guidance issued by the Federal Motor Carrier Safety Administration reiterates that the employer retains the authority to discharge an employee who tests positive for drugs.[31]

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leave federal courts no choice but to become complicit in the threat to public safety entailed by such awards.

[31] *See* FMCSA, Regulatory Guidance on Part 382—Controlled Substances and Alcohol Use and Testing, Guidance on 49 C.F.R. § 382.605 (visited May 31, 2000) <http://www.fmcsa.dot.gov/rulesregs/fmcsr/regs/382reg.htm>.

All this makes clear that the regulations adopted pursuant to the Testing Act do not "entirely occup[y] the field" with respect to the public policy at issue. Restatement § 179, comment b. While the Act and its regulations could have prescribed a uniform sanction for every failed test, or attempted to address every varied situation that might arise—including that of a recidivist—such an effort to devise a comprehensive code would not necessarily have served the public policy. No fixed regulatory scheme could be expected to anticipate the variety of factual circumstances that might arise or dictate the appropriate sanction that might apply to each scenario. Instead, the regulations set out certain guidelines and requirements, and leave other details unresolved. While employers and employees therefore remain free to agree by contract on both the process for addressing violations of the drug policy and on sanctions for those violations, any such agreement—like all other contractual arrangements—remains subject to the public policy doctrine, applied by the courts. Nothing in the Act or regulations suggests otherwise.

A court that declines to enforce an award returning a two-time drug abuser to his safety-sensitive position is not engaged in some free-wheeling and unbridled exercise of policy formation. Instead, the court is guided by the broad national consensus that those who use illegal drugs should not be entrusted with safety-sensitive tasks, and the judgment that returning a two-time offender to such tasks would make a mockery of policies adopted by the Executive and the Legislature. The public policy doctrine allows the courts to avoid complicity in that mockery, and the very real threat to public safety it entails.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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